DATE: FEBRUARY 28, 1997

CASE NO: 95-INA-8

In the Matter of

QUALCOMM, INC.
Employer

on the behalf of

CHINNAPPA GANAPATHY
Alien

Before: Huddleston, Jarvis and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Qualcomm's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined or certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through

the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On March 12, 1993, Employer filed a Form ETA 750, Application for Alien Employment Certification, with the California Employment Development Department ("EDD") on behalf of Chinnappa Ganapathy ("Alien"). AF 11, 82. The job opportunity was listed as an Engineer (Hardware Design.) AF 11. The application required a Masters degree in electrical engineering ("MSEE"), one year of experience as a software engineer as well as the following special requirements:

> Experience in VLSI and Logic Design, Computer Architecture, VLSI CAD, Spice, Crystal, Timing Analyzer, "C," Pascal, 8086 Assembly, Unix, DOS and Apple Macintosh, Logic Analyzer, Oscilloscopes, Spectrum Analyzer, Waveform Generator, and Emulator. Id.

The job duties were described as:

> VLSI design, all phases of ASIC design, high level architecture, circuit modeling, circuit synthesis, logic design, layout, circuit simulation, testing of pre-production ASICs, evaluation of VLSI CAD tools to determine suitability for applications. Id.

EDD referred 13 resumes to Employer. AF 68. On September 20, 1993, Employer submitted a Report of Recruitment which stated that it had complied with all posting and advertising requirements and found none of the thirteen applicants qualified for the position. AF 30-33.

The CO issued a Notice of Findings ("NOF") on January 12, 1994. AF 7. The NOF stated an intention to deny the application because of Employer's failure to (1) offer the actual minimum requirements for the job in violation of 20 C.F.R. 656.21(b)(5); and (2) consider qualified U.S. workers. AF 8-9. The CO stated that it appeared that the Alien did not possess the minimum requirements at the time he was hired by Employer. Therefore, he required Employer to: delete or alter the requirements on the Form ETA 750A; or "show why it is not feasible to hire anyone with less than these requirements."; or show that the Alien had acquired the required experience or training elsewhere. AF 8. The CO also indicated that Employer could establish that the

Alien had obtained the requisite experience by showing that "the occupation in which the alien was hired is dissimilar from the occupation for which you are seeking labor certification." AF 9. The CO also required "an amendment to ETA 750B form signed by [the] alien showing background in items at issue." Id.

Employer filed its rebuttal to the NOF on February 14, 1994. AF 5-6. The documentation included in the rebuttal consisted of the original ETA Forms 750A, 750B and a copy of the Alien's resume. Id. Employer argued that it did not "state or represent that the alien was hired in a trainee position or that any experience gained while working for the employer was used in qualifying him for the position under review for certification." Id. Employer claimed that the alien had 20 months of prior experience as a software engineer before working for it. Id. Employer also asserted that it did not understand the NOF's comments concerning the alien's prior experience, and it requested the issuance of a new NOF clarifying this issue. Id.

The CO issued a Final Determination ("FD") on April 18, 1994, denying the application. AF 3-4. The FD found that Employer failed to satisfactorily rebut the NOF. Id. The reasons for denial were the Employer's failure to offer minimum requirements and that there existed qualified U.S. workers. Id. Employer filed a request for review on May 23, 1994, and a subsequent brief. AF 1.

Discussion

Under the regulations an employer is required to document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job. The employer must also show that it has not hired workers with less training or experience for similar jobs. 20 C.F.R. 656.21(b)(5), Bently Nevada Corp., 91-INA-63 (March 31, 1992). Employer, therefore, must establish that the Alien had the stated requirements for the job when he was first hired. See Pennsylvania Home Health Services, 87-INA-696 (April 7, 1988).

In the case at bench, Employer requires a MSEE, one year of experience as a software engineer and specific special requirements, including experience in VLSI and Logic Design, Computer Architecture, VLSI CAD, Spice, Crystal, Timing Analyzer, "C," Pascal, 8086 Assembly, Unix, DOS and Apple Macintosh, Logic Analyzer, Oscilloscopes, Spectrum Analyzer, Waveform Generator, and Emulator. AF 11. Thus, the Alien must have had these qualifications at the time he was hired by Employer or must not have acquired them in the position for which certification is sought.

When an alien receives experience while employed by the employer, the employer has the burden of demonstrating that the

alien gained that experience in a job not similar to the job for which the certification is sought. L.A. Rubber Co., 89-INA-58 (Sept. 28, 1989). Furthermore, under the regulations an employer may not validly require U.S. workers to possess stricter training or experience than an alien when first hired by the employer. 20 C.F.R. 565.21(b)(5), Kurt Salmon Assoc. Inc., 87-INA-636 (Oct. 27, 1988).

The record lacks evidence showing that the Alien had the qualifications required by Employer on the Form ETA 750A prior to his original hiring. The Alien's resume states that he had the required one year of prior experience as a software engineer. AF 86. However, according to the Alien's resume, he received his experience in VLSI design, circuit design and architecture, and tool testing at his job for Employer. Id. The record does not disclose if the Alien had the "special requirements" experience required by the employer in the Form ETA 750A prior to his original hiring. AF 11. The Alien's resume states under "Education" that he has areas of expertise in VLSI design, Logic Design, Computer Architecture, VLSI CAD, Design Automation, Data Structures, Operating Structures and Switching Theory but does not indicate where and when this expertise was acquired. AF 86. Furthermore, the "Experience" portion of the resume does not include these items for any job prior to his being hired by Employer. Id.[1] Employer has not met its burden of demonstrating that the Alien had the minimum requirements it is requiring of U.S. applicants at the time he was first hired nor has it provided evidence that it is not feasible to hire anyone with less than these requirements as required by the CO in the NOF. AF 8.

Employer argues at length in its brief that the CO failed to provide adequate notice of the deficiencies of the application, that a request for clarification was ignored and that the FD is based upon reasons not previously raised. We find no merit to Employer's assertions. The NOF clearly stated the grounds for the application's deficiencies as failure to offer minimum requirements and that qualified U.S. workers existed. AF 8-9. Moreover, the NOF specifically stated the corrective actions required of Employer to remedy the deficiencies. Id. The Employer, however, did not comply with the CO's demands. Thus, the CO in the FD did not raise any new issues as it correctly denied the application for Employer's failure to offer minimum requirements and that qualified U.S. workers existed for the position as stated in the NOF. AF 4.

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[1] We note that Alien's statement of expertise is almost an exact copy of the "special requirements" required by employer in his application for alien employment certification. See AF 11, 86.

As Employer has not met its burden of demonstrating that the Alien had the minimum requirements it is requiring of U.S. applicants at the time he was first hired, we need not reach the issue of whether there existed qualified U. S. workers.[2]

ORDER

The Certifying Officer's Final Determination denying labor certification is AFFIRMED.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

[2] We also note that Employer failed to rebut the finding that it did not interview any of the apparently qualified 13 U.S. applicants. AF 9. Employer's failure to interview these applicants could have been a basis for denying the application. Castle Wood Egyptian Farms, Inc., 93-INA-349 (Jan. 11, 1995); Wilton Stationers, Inc., 94-INA-232 (April 20, 1995).